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In The
Supreme Court of the United States

GOLDEN BRIDGE TECHNOLOGIES INC.,
Petitioner,

v.

MOTOROLA INC; ERICSSON INC; QUALCOMM INCORPORATED; LUCENT TECHNOLOGIES INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY BRIEF

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TABLE OF AUTHORITIES

Cases

Broadcom Corp. v. Qualcomm Inc.,
501 F.3d 297 (3rd Cir. 2007) 3, 5, 7

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15 U.S.C. § 1 ..... 1, 2, 7

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 1a-11a) is published at 547 F.3d 266. The First memorandum opinion and order of the United States District Court for the Eastern District of Texas (Pet. App. 32a-50a) is published at 416 F.Supp.2d 525. The Second memorandum opinion and order of the United States District Court for the Eastern District of Texas (Pet. App. 12a-31a) is unpublished. It is unofficially reported at 2007 WL 2688487.

JURISDICTION

This judgment of the Court of Appeals was entered on October 23, 2008. The Petition for Writ of Certiorari was filed on January 21, 2009, and placed on the docket on February 23, 2009. The Brief of the Respondents in Opposition was filed on March 25, 2009. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION [INVOVLED]

The Sherman Act, 15 U.S.C. § 1, provides as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

PETITIONER'S REPLY TO BRIEF OF THE RESPONDENTS' IN OPPOSITION

I. Petitioner's Legal Question is Properly Before this Court

Respondents are incorrect in asserting that this case does not present the legal issue identified in Petitioner's Question Presented. To support their argument, Respondents mischaracterize the nature of Petitioner's pleadings to the lower courts in this matter and contend that Petitioner did not present any argument based upon or related to deceptive conduct in the standard setting organization context. Respondents' contention in this regard is not supported by the record and in fact, is directly contradicted by two of Petitioner's primary briefings to the lower courts in this case, including (1) Petitioner's Cross Motion for Summary Judgment before the District Court, and (2) Petitioner's Reply Brief to the Fifth Circuit Court of Appeals.

Petitioner, Golden Bridge Technology ("GBT"), consistently argued in lower both lower courts that Respondents' deceptive conduct, which violated 3GPP mandates, requires the imposition of antitrust liability under 15 U.S.C. § 1. Petitioner has actively pursued this theory of the case since the outset of this matter. In support of its theories, Petitioner presented ample factual and legal authority to the lower courts as a means to prove the existence of Respondents' conspiracy to exclude GBT's technology from the wireless communications market. Respondents' argument to the contrary ignores the record GBT has established in the District Court and to the Fifth Circuit Court of Appeals.

The main thrust of Petitioner's legal argument has always been that Respondents engaged in an improper and unsanctioned series of email communications in violation of the Third Generation Partnership Project ("3GPP") mandates. Moreover, Petitioner has specifically cited and relied upon persuasive legal authority which requires the imposition of antitrust liability when deceptive conduct occurs within the confines of a standard setting organization including citations to and arguments based on *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, n. 5 (3rd Cir. 2007). Accordingly, the legal question presented by Petitioner's is properly before this Court.

II. Petitioner's Cross Motion for Summary Judgment before the District Court Identified the Issues in Petitioner's Question Presented here

While this matter was pending before the District Court, Petitioner filed a Cross Motion for Summary Judgment which specifically presented two issues for the Court's consideration as follows:

A. Whether the Defendants' communications, made in secret to implement a plan to exclude CPCH technology, were not authorized by the 3GPP organization because they failed to meet the 3GPP requirements for either an ad hoc or off-line session.

B. Whether this Court should find that Defendants' communication fall outside of any standards setting process as a matter of law because they were not requested,

> established or authorized by the 3GPP organization.

See, Pet. App. 61a.

These issues were presented, briefed, and argued in an attempt to obtain a ruling from the District Court that Respondents' conduct: (1) was not authorized by 3GPP, and (2) fell outside the confines of any standard setting process. Petitioner sought this ruling in order to support its ultimate position that Respondents engaged in an unlawful conspiracy outside the confines of any legitimate 3GPP activities and therefore, did not serve the pro-competitive benefits inherent in the standard setting process. Petitioner supported its legal theory by arguing that Respondents' secret email exchange had not been sanctioned by 3GPP, and in fact had violated fundamental rules established by 3GPP to govern the consensus process.

Despite the consistency in Petitioner's legal position before the District Court, Respondents Opposition Brief brazenly argued that: "There is no claim in this case that Respondents violated any 3GPP disclosure rule, or deceived anyone about anything." Respondents' Brief at p. 10. This contention is directly contradicted by the record. Moreover, Respondents intentionally ignore the underlying premise of Petitioner's legal action, to wit: Respondents engaged in an unlawful conspiracy, outside the confines of 3GPP, to remove CPCH from the market.

III. Petitioner's Reply Brief to the Fifth Circuit Court of Appeals Continues the Assertion of the Legal Arguments Before this Court

On appeal, Petitioner's legal theory remained consistent. In its reply brief to the Fifth Circuit, Petitioner argued that:

> Appellees' conduct, before, during and after the Tokyo meeting did not comply with established policies and procedures, resulting in anticompetitive activity under the applicable per se rule.

See, Pet. Reply App. 12a. Moreover, the first heading of Petitioner's Argument and Authority section read:

Appellees' Email Exchange Was Unauthorized and Resulted in Anti-Competitive Conduct

See, Pet. Reply App. 14a. In this way, Petitioner's brief unequivocally expressed GBT's contention that Respondents' unauthorized email exchange constituted anti-competitive conduct. As authority for this position, Petitioner specifically cited to the section in *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, n. 5 (3rd Cir. 2007) where the Third Circuit Court stated:

> Thus, ***antitrust law has historically been concerned with the risk of one or a small number of participants capturing the economic power of an industry-wide standard and turning the SSO into a source of exclusionary power***. Simply put, by hijacking or capturing an SSO, ***a single***

> ***industry player can magnify its power and effectuate anticompetitive effects on the market.***

See, Pet. Reply App. 14a. Relying upon this authority, Petitioner's briefing emphasized the danger posed when a single competitor abuses the standard setting process. Petitioner's briefing also underscored the importance of abiding by SSO policies and procedures, to wit: "...following SSO policies and procedures is critical to prevent abuse and protect the pro-competitive goals of the standard setting organization." See, Pet. Reply App. 15a.

Despite the clarity of Petitioner's briefing as cited above, Respondents' Opposition posits inaccurate contentions which boldly misstate Petitioner's legal position in this matter. For instance, Respondents' Opposition Brief argues: "It is no wonder then that neither Rambus, Broadcom nor any other so-called 'patent holdup' case was cited by Petitioner or considered by the courts below."[1] See, Respondents' Brief at p.13. Respondents' brief goes on to argue that: "To the extent Petitioner is truly advancing a Broadcom-style deception argument, it was never raised below and is therefore waived." See, Respondents' Brief at p. 19. However, it is apparent from a review of the record that Petitioner has consistently asserted the current legal question before this Court. Respondents' suggestion that such issues

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[1] Respondents fail to acknowledge that the *Rambus* decision was not decided by the District of Columbia Circuit Court of Appeals until April 22, 2008. As a result, Petitioner could not have cited or relied upon the *Rambus* decision because it was not in existence at the time briefing was submitted to the Fifth Circuit Court of Appeals.

"were never raised" is a thinly veiled attempt to distract the Court from the important legal issues presented by this case.

Furthermore, Petitioner's briefing did cite to the *Broadcom* decision, and relied upon the Third Circuit's holding as a means to support Petitioner's legal theory that Respondents' engaged in deceptive conduct which disregarded the rules governing 3GPP's consensus process. As a result, Respondents' actions imperiled the pro-competitive benefits which allow 3GPP to operate outside the strictures of the Sherman Act. Once Respondents, acting jointly, stepped outside the confines of 3GPP's legitimate standard setting framework, they exposed themselves to potential antitrust liability for deceptive conduct in derogation of 15 U.S.C. § 1. Petitioner's contentions in this regard have never wavered.

CONCLUSION

Petitioner has consistently maintained that deceptive conduct which subverts the pro-competitive goals of standard setting organizations violates the Sherman Act. GBT's legal arguments on this important issue were briefed to both the District Court and to the Fifth Circuit Court of Appeals. In light of Petitioner's well-briefed position regarding SSO subversion it is clear that the issue is properly before this Court for consideration.

Respectfully Submitted,

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